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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	**MM Docket No. 92-266**
Rate Regulation	)	

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COMMENTS OF
DISCOVERY COMMUNICATIONS, INC.

Discovery Communications, Inc. ("Discovery"), by its attorneys, hereby submits its comments on the *Further Notice of Proposed Rulemaking* ("*Further Notice*") in the above-captioned proceeding.[1] The Commission in its initial Report and Order in this docket premised its regulation of cable rates on a "benchmark" approach which compared the cable programming charges of cable systems subject to "effective competition," as defined in the 1992 Cable Act,[2] and those not subject to effective competition. The Further Notice seeks to ascertain whether or not in evaluating the programming rates of cable systems subject to effective competition it should include certain "low penetration" cable systems. The FCC is

[1] Report and Order and Further Notice of Proposed Rulemaking (released May 3, 1993) (*"Report and Order"*), *summary of Further Notice of Proposed Rulemaking published,* 58 *Fed. Reg.* 29,769 (May 21, 1993).

[2] Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act").

concerned that their inclusion could have distorted the benchmark results because the low penetration could be attributable to factors other than competition.

As discussed below, Discovery believes that excluding such "low penetration" systems from the benchmark calculus would not be proper either as a matter of law or policy. First, the FCC is obligated to use the 1992 Cable Act's definition of what constitutes a competitive cable system when fulfilling its mandate to set standards for rate regulation of cable systems not subject to effective competition. Second, such an action, because it would mean an even greater revenue loss for cable operators -- and for more operators than even under the current regulations -- would further disrupt the cable program market. Consequently, it would be even more difficult, if not impossible, for cable operators to launch new cable program services (other than on an á la carte basis). This result would undercut achievement of one of the Act's primary objectives -- promoting the diversity of cable programming.

I. INTRODUCTION.

Discovery owns and operates The Discovery Channel and The Learning Channel. Founded in 1985, The Discovery Channel features nonfiction documentaries about science, nature, technology, human events, and history. The Discovery Channel now reaches about 60 million subscribers and is one of the most enjoyed and appreciated cable networks in the country.

Discovery acquired The Learning Channel[3] two years ago and has since invested substantial sums in upgrading its programming. At present, The Learning Channel is available only on about 15 percent of the cable systems in the United States and reaches approximately 20 million subscribers. At the time the regulations became effective, Discovery was negotiating with many cable operators throughout the nation for carriage of The Learning Channel in an effort to increase its distribution.

Since announcement of the cable rate regulation rules, however, the vibrant market for new cable program services has disappeared. Some of the cable systems that had tentatively agreed to take The Learning Channel now say that they are no longer interested -- at least for the near-term. Ongoing discussions concerning new launches of The Learning Channel have been broken off or postponed. MSOs (representing more than 500,000 potential Learning Channel subscribers) have almost uniformly attributed their abrupt change in plans to the potentially devastating effects of the FCC's rate decision, both on system revenues and future business plans.

Discovery respectfully suggests that additional rate rollbacks would not be in the public interest. They would only make it harder for new program services to obtain carriage. The ultimate loser would be the cable consumer who could end up with poorer service and less choice.

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[3] The Learning Channel features educational programs on subjects such as history, science, archeology, and anthropology for viewers of all ages. It also provides six hours of commercial-free educational programming for preschoolers every weekday morning.

II. THE COMMISSION SHOULD NOT EXCLUDE "LOW PENETRATION" CABLE SYSTEMS FROM ITS CALCULATION OF RATE BENCHMARKS.

In the 1992 Cable Act, Congress sought to balance the consumer interest in reasonable cable rates and the "substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."[4] Congress wanted cable to continue "to provide the widest possible diversity of information sources and services to the public."[5] The *Further Notice*'s proposal to reduce the benchmark rates still further would be inimical to the balance Congress sought and would be contrary to law.

A. The Commission Lacks Legal Authority To Exclude "Low Penetration" Systems From Its Calculation Of The Competitive Rate Differential.

The *Further Notice* invites comment regarding whether the Commission has the legal authority to exclude so-called "low penetration" systems from its calculation of the rate differential. The simple answer is that it does not.

As the *Further Notice* recognizes, in Section 623 of the Cable Act -- the very section that provides for rate regulation of cable systems -- the Congress of the United States established a specific definition of when "effective competition" exists. That definition expressly provides that cable systems having a subscribership of "fewer than 30 percent of the households in the franchise area" -- *i.e.*, the "low penetration" systems at issue in the

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[4] Cable Act, § 2(a)(6).

[5] 47 U.S.C. § 521(4).

Further Notice -- constitute systems subject to "effective competition."[6] That section of the Act also requires the Commission to use the rates charged by systems facing "effective competition" in setting rate standards. Discovery submits that the Act does not permit the Commission to second-guess congressional judgment by using a different definition to achieve a lower per channel benchmark.

It is a well-established principle of statutory construction that terms defined in a statute must be given that meaning when the statute is applied.[7] In addition, courts have repeatedly held that agencies may not effectively rewrite a statute, but must apply the clear meaning of statutory language.[8] Therefore, Discovery submits that the Commission may not lawfully ignore low penetration systems in determining the rates charged by cable systems that are subject to "effective competition."

B. In View Of The Current Industry Uncertainty, A Further Reduction In Benchmark Levels Could Seriously Impede The Cable Act's Goal Of Promoting The "Widest Possible Diversity Of Information Sources And Services."

As discussed above, Discovery already has experienced the early effects of the cable rate regulations adopted in April. They have caused a dramatic change in the ability of cable

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[6] *See* Cable Act, § 623, *codified at* 47 U.S.C. § 543.

[7] *See Sutherland Statutes & Statutory Construction* § 20.08, 1992 Supp. at 16 (4th ed. 1985); *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

[8] *See, e.g., Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986) (stating that agency "has no power to correct flaws that it perceives in the statute it is empowered to administer").

programmers to sell new program services. Even assuming *arguendo* that the Commission has the legal authority to exclude the low penetration systems and reduce cable rates an additional $1.8 billion, Discovery would urge the Commission not to worsen an already potentially disastrous climate by ordering further rate reductions.

Although it is still too early to discern the consequences of the Commission's current rate regulations on specific cable system finances, the impact of the regulations on the overall market are already obvious. The Commission estimates that its new regulations will result in industry-wide revenue reductions of at least one billion dollars.[9] And, at least one analyst has tried to quantify the effect on specific cable systems and found it to be "devastating."[10] Certainly, the abrupt change in April in the willingness of cable operators to launch new program services confirms the view that rate regulation, even in its current form, is inhibiting the ability of cable systems to invest in new programming services and may,

pass-throughs imposed by the "price cap" will not provide sufficient incentives to operators to add new channels. The pass-throughs, even in the most generous interpretation, only keep the cable operator "whole"; they do not allow cable operators to earn a profit on their programming investment. Discovery submits that some additional incentive in the form of profit on system investment and programming would help to lessen uncertainty and improve conditions in the market.[11]

While Discovery is not in a position to comment on the Commission's technical analysis of the prices charged by the different categories of systems facing "effective competition" as defined by the Cable Act, it does wish to emphasize that additional FCC-mandated rate reductions would have a drastic effect on the other interests that the Cable Act is intended to promote. Not only would cable systems that currently face a substantial rate reduction remain unable to add new program services, but the disincentives would extend further to other systems whose rates satisfy the current, but not still lower future, benchmarks. In addition, further rate reductions also would inevitably send a signal to the capital markets that investing in new cable programming would be so risky as not to be advisable.

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[11] While cable operators do have an incentive to launch new services on an unregulated basis where they can earn a reasonable profit, program services will find it difficult to survive with the limited distribution obtainable through á la carte distribution. Moreover, consumers ultimately will have to pay more for á la carte services. Program services such as The Learning Channel that provide quality educational programming (including six hours of commercial-free educational programming for preschoolers every weekday) would be available only to those who can afford to pay the higher prices charged for á la carte services (if such services survive at all).

In short, further rate reductions beyond those already ordered would inevitably compound the effects seen to date. Cable systems would be even less able to launch new program services. Valuable program services such as The Learning Channel will find it difficult, if not impossible, to achieve the critical distribution needed for success, and capital markets will, therefore, be less willing to continue to provide financing for existing services and to invest in new ones.

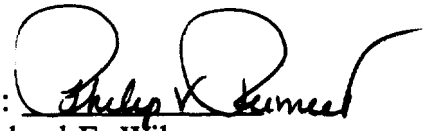
III. CONCLUSION.

In its desire to assure low cable rates, the Commission should not ignore the plain language of the Cable Act or contravene the Act's goal of encouraging a strong market in programming services and ensuring that cable subscribers have access to a wide diversity of programming. The ultimate losers in such a situation would be the nation's cable subscribers. Accordingly, Discovery Communications, Inc., respectfully submits that the

Commission should not adopt the proposal in the *Further Notice of Proposed Rulemaking* to ignore low penetration systems in setting rate benchmarks.

Respectfully submitted,

DISCOVERY COMMUNICATIONS, INC.

By: 

Judith A. McHale
Senior Vice President and
General Counsel
Barbara S. Wellbery
Vice President and
Deputy General Counsel
DISCOVERY COMMUNICATIONS, INC.
7700 Wisconsin Ave.
Bethesda, MD 20814

Richard E. Wiley
Philip V. Permut
Lawrence W. Secrest, III
William B. Baker
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

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